No. 15-138

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners,

v.

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEF IN OPPOSITION

MARK R. SEIDEN
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

GREGORY G. KATSAS
Counsel of Record
JOHN M. GORE
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
ggkatsas@jonesday.com

Counsel for Petitioners

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The question presented in the petition for certiorari—whether or to what extent RICO applies extraterritorially—undeniably warrants this Court's attention. Just recently, the D.C. Circuit recognized the split on this issue between the decision below and the Ninth Circuit's decision in *Xu*. Respondents do not seriously deny the existence of this circuit split; instead, they contend that the split might resolve itself. However, the Second Circuit refused to reconsider its decision en banc, despite recognizing that it conflicts with *Xu* and despite several strong dissents from denial. Moreover, the Ninth Circuit has continued to apply *Xu*, despite the Second Circuit's decision. The split is thus mature, and respondents do not deny that it implicates an important and recurring question.

Respondents contend that this case does not squarely present the question of RICO's extraterritoriality. That would come as a surprise to the panel, which addressed at length precisely that question; to the five circuit judges who dissented from denial of en banc on that question; and to the district judge, who has stayed proceedings below pending the disposition of this petition. Respondents assert that their complaint alleges some domestic racketeering activity, one domestic enterprise, and one domestic injury. However, the complaint also undeniably alleges one foreign enterprise and a slew of foreign racketeering activity and injuries. The scope of this case thus turns dramatically on whether the Second Circuit correctly extended RICO to foreign racketeering activity, foreign enterprises, and foreign injuries, and the presence of all three makes

this case an ideal vehicle for considering RICO's extraterritoriality.

Finally, Respondents argue at length about the merits. However, those arguments provide no good reason for this Court to ignore the entrenched circuit split, and are unpersuasive even on their own terms.

I. The Question Presented Clearly Warrants Review

The question whether RICO applies extraterritorially, and if so to what extent, is an important and recurring one that has divided the courts of appeals and produced widespread confusion more generally.

A. As shown in the petition, the decision below squarely conflicts with *United States v. Xu*, 706 F.3d 965 (9th Cir. 2013), in which the Ninth Circuit held that "RICO does not apply extraterritorially" (*id.* at 974) and that any alleged pattern of racketeering, "to the extent it [is] predicated on extraterritorial activity," is thus "beyond the reach of RICO" (*id.* at 978). Moreover, even before the Second Circuit created that split, there was widespread confusion between one line of cases (including *Xu*) holding that RICO is limited to domestic patterns of racketeering but extends to foreign enterprises, and another line of cases holding that RICO is limited to domestic enterprises but extends to foreign patterns of racketeering. Pet. 16-25.

After the petition was filed, the D.C. Circuit confirmed the existence of the circuit split. In *Hourani v. Mirtchev*, Nos. 13-7088 & 13-7099, 2015 U.S. App. LEXIS 13342 (D.C. Cir. July 31, 2015), that court managed to avoid what it described as the

"thorny question of whether or when RICO applies to . . . foreign conduct." *Id.* at *13. The D.C. Circuit explained that "[t]he courts of appeals have split on the issue," and it specifically contrasted the holding below that "RICO can apply to extraterritorial conduct 'if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate'" with the holding of the Ninth Circuit that "RICO does not apply extraterritorially" and thus requires a domestic "pattern of racketeering activity." *Id.* at *13 n.2 (citations omitted).

Without seriously contesting the existence of the circuit split, respondents speculate that the split might resolve itself because the various courts to have held that RICO has no extraterritorial application may now reverse themselves, fall in line behind the Second Circuit, and conclude that RICO does after all extend to extraterritorial patterns, enterprises, and injuries. Opp. 20, 23. However, in nearly 18 months since the decision below, not a single court outside the Second Circuit has reversed itself on RICO's extraterritoriality or otherwise adopted the Second Circuit's extreme position. Moreover, the Ninth Circuit recently *reaffirmed* its position despite being urged by the plaintiff to follow the Second Circuit. *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, No. 13-15848, 2015 U.S. App. LEXIS 11574, at *6 (9th Cir. July 6, 2015) (remanding "with instructions for the district court to apply the test set forth in *Chao Fan Xu*"); *see* Brief of Plaintiff-Appellee and Cross-Appellant at 27-31, *Mitsui*, CA9 No. 13-15848 (ECF Docket No. 27-1).

Respondents nonetheless speculate that the decision below "will resonate with the Ninth Circuit"

(Opp. 20) because that court has looked to object offenses to determine the extraterritorial scope of derivative crimes such as conspiracy and aiding-and-abetting. Opp. 21-23. But as Judge Raggi explained, that analogy critically misunderstands the role of predicate offenses in RICO itself. Pet.App. 90a-91a. In any event, the Government in *Xu* invoked that analogy as a basis for extending RICO to extraterritorial patterns of racketeering activity, *see* Govt. Br. at 47-53, *Xu*, CA9 No. 09-10189 (ECF No. 53-1), but the Ninth Circuit rejected it there, then rejected it again in *Mitsui*.

Finally, Respondents briefly contend that the Ninth Circuit, despite its contrary legal rule, would "reach the same result" on the "facts of this case." Opp. 18. That is incorrect. In this case, the Second Circuit allowed respondents to pursue RICO claims predicated on allegations of domestic mail fraud, wire fraud, and Travel Act violations (Pet.App. 18a-24a) *and* on allegations of extraterritorial money laundering and material support for terrorism (Pet.App. 17a-18a). By contrast, the Ninth Circuit, faced with comparable allegations of domestic and foreign racketeering activity, squarely limited the claims before it to the former. *See* 706 F.3d at 978 ("to the extent it was predicated on extraterritorial activity," claim at issue was "beyond the reach of RICO").

B. As shown in our petition, the Second Circuit's foreign-cubed expansion of RICO is a matter of considerable importance, as it provides a roadmap for various kinds of exotic disputes from around the world to make their way into federal court. Pet. 26-29; *see also* WLF Amicus Br. 7-21.

Respondents do not dispute that the extraterritorial scope of RICO is an exceptionally important question, but they nonetheless claim the decision below is a "fact-bound" one that will have only "limited" impact. Opp. 16. Respondents attempt to limit the decision to its facts, which they say involve "allegations that U.S. companies, acting on U.S. soil and using U.S. financial institutions, have engaged in domestic racketeering involving a domestic enterprise resulting in domestic injuries." Opp. 17. But respondents ignore the presence of *other* critical facts—namely their own allegations of extraterritorial predicate acts, extraterritorial enterprises, and extraterritorial injuries. As we have shown, the Second Circuit categorically extended RICO to foreign patterns of racketeering activity, to the extent predicated on offenses that apply extraterritorially (Pet.App. 9a); to foreign enterprises (Pet.App. 14a); and to foreign injuries (Pet.App. 58a). Its decision could hardly have been more sweeping.

For similar reasons, respondents miss the point in trying to minimize the decision below as interlocutory. It is true enough, as respondents note, that the scope of the case may change on remand. Opp. 14-16. Nonetheless, the Second Circuit has now definitively adopted a dramatic expansion of RICO, which will bind not only the district court on remand, but also all other cases and appeals within the Second Circuit. Moreover, despite respondents' suggestion to the contrary, a decision by this Court addressing the territorial scope of RICO would "fully and finally resolve" that question, and would in no sense be "hypothetical" (Opp. 15).

Finally, respondents point to two RICO cases dismissed as impermissibly extraterritorial even under the decision below. Opp. 16. Both were predicated "exclusively on the wire fraud statute," which applies only domestically. *Petroleos Mexicanos v. SK Eng'g & Constr. Co.*, 572 F. App'x 60, 61 (2d Cir. 2014); *see Laydon v. Mizuho Bank, Ltd.*, No. 12 Civ. 3419, 2015 U.S. Dist. LEXIS 44126, at *30 (S.D.N.Y. Mar. 31, 2015). However, under the decision below, *all* RICO claims predicated on offenses that apply extraterritorially *would* be viable—including, for example, claims predicated on allegations of money laundering to facilitate narcotics trafficking in Europe, to facilitate human-rights abuses in Iraq, or to facilitate political corruption in Kazakhstan. Pet. 27-28; *see* Pet.App. 72a-73a n.8 (Cabranes, J., dissenting from denial of en banc). Moreover, this concern is far from hypothetical, as the decision below has already changed specific outcomes in actual cases. Pet. 27.

II. This Case Squarely Raises The Question Presented

Respondents' lead objection to certiorari is that "this case does not present a genuine problem of extraterritoriality," because their RICO claims allege "domestic racketeering (as held by the Second Circuit); a domestic enterprise (as held by the Second Circuit); and domestic injuries (as recognized by Reynolds in the court below)." Opp. 10. But respondents do not, and cannot, dispute that their RICO claims *also* allege a slew of foreign racketeering activity, at least one foreign enterprise, and some three dozen foreign injuries. That is why the Second Circuit had to *answer* the question

presented. Pet.App. 18a (claims satisfy "requirements for extraterritorial application of RICO"). Moreover, because respondents' extraterritorial allegations lie at the heart of their case, the courts' answer to the extraterritoriality question—along any of its possible dimensions—has significant practical as well as theoretical significance to the case. Accordingly, this case presents an ideal vehicle for answering the question presented.

A. Throughout their brief, Respondents claim that the Second Circuit held that they had stated a "domestic cause of action." Opp. 1, 8, 9, 11, 15, 18 (all quoting Pet.App. 23a). True enough, but respondents omit half of what the Second Circuit actually held. That court recognized that the complaint alleged domestic predicate acts *and* foreign predicate acts, it analyzed each set separately, and it concluded that RICO covers *both*.

After the Second Circuit concluded that "RICO applies extraterritorially if ... liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate" (Pet.App. 9a), the court then applied that rule to "the conduct alleged in the complaint" (Pet.App. 16a). In the holding trumpeted by respondents, the court concluded that the alleged wire fraud, mail fraud, and Travel Act violations were domestic, and thus could serve as RICO predicates even though those statutes do not apply extraterritorially. Pet.App. 18a-24a. However, the court *further* held that the allegations of money laundering and material support for terrorism could *also* serve as RICO predicates in this case. As to those allegations, the court recognized that the

alleged misconduct occurred overseas, but held that RICO nonetheless applied because those predicate offenses "apply extraterritorially" to the conduct alleged. Pet.App. 16a-18a.[1]

The question presented thus squarely controls the permissible scope of respondents' RICO claims. And that makes a critical difference, because the alleged money laundering lies at the heart of respondents' allegations. For example, the complaint's introduction refers exclusively to money laundering (Pet.App. 134a-136a), with mail or wire fraud not even mentioned until paragraph 47 (Pet.App. 161a) and the Travel Act not even mentioned until paragraph 159 (Pet.App. 239a). Moreover, the complaint formally defines the actionable enterprise as "the RJR Money-Laundering Enterprise" (Pet.App. 238a), and it describes the other alleged predicate acts as playing a supporting role to money laundering. Pet.App. 203a ("The money-laundering scheme is advanced by numerous acts of wire fraud and mail fraud ...."). In turn, the permissible scope of the predicate acts affects not only the evidentiary presentation but also the available damages, which must "flow from the commission" of the actionable "predicate acts." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985); *see Anza v. Ideal Steel Supply*

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[1] Respondents do not dispute that their allegations of money laundering and material support involve purely extraterritorial conduct. Indeed, every step of the alleged money-laundering scheme involved foreign transactions, including the sale of cigarettes by Petitioners to wholesalers. Pet. 4-5; Pet.App. 152a-159a; Pet.App. 174a (alleging in-person sales in Colombia); Pet.App. 176a (same).

Corp., 547 U.S. 451, 460 (2006) (requiring "direct causal connection" between predicate acts and ensuing injury). Thus, if RICO does not extend to extraterritorial money laundering, respondents cannot recover for any injuries that it may have caused them. For all of these reasons, excising the alleged money-laundering predicates would dramatically scale back the case.

B. This case also squarely presents the question whether RICO requires a domestic enterprise. The operative complaint alleges an "RJR Money-Laundering Enterprise" consisting of Petitioners, overseas narcotics dealers, and various other overseas "distributors, shippers, currency dealers, wholesalers, money brokers, and other participants." Pet.App. 237a-238a. The district court held that this alleged enterprise was "foreign," given its nerve center in far-flung locales. Pet.App. 52a. The panel below did not dispute that holding (Pet.App. 12a), and respondents do not dispute it in their brief in opposition. The Second Circuit thus had ample reason to decide whether RICO extends to foreign enterprises. Pet.App. 14a-15a.

Respondents highlight the Second Circuit's conclusion that the complaint *also* alleged a *different* enterprise, namely the Brown & Williamson Tobacco Company. Pet.App. 13a-14a n.5. That is the basis for respondents' repeated assertion (Opp. 5, 8, 11, 12, 17) that this case rests on a domestic enterprise. In fact, it now rests on two alleged enterprises—one foreign and one domestic.

The question whether RICO extends to *both* enterprises significantly impacts this case. The alleged foreign "RJR Money-Laundering Enterprise"

supports the claim that petitioners conducted the affairs of an enterprise through a pattern of racketeering activity—in other words, that they used the covered "enterprise" as a *vehicle* for racketeering. *See* 18 U.S.C. § 1962(c). In contrast, the Brown & Williamson allegation supports the entirely distinct claim that petitioners invested the proceeds of racketeering activity in an enterprise—in other words, that they made the covered "enterprise" a *victim* of racketeering. *See id.* § 1962(a). Not surprisingly, the damages associated with these distinct theories are also different—as the panel itself recognized, a plaintiff seeking damages for a violation of § 1962(a) "must allege an 'injury from the defendants' investment of racketeering income in an enterprise,' rather than relying on the violation of one of the predicate acts." Pet.App. 13a-14a n.5 (quoting *Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir. 1990)). The enterprise question thus also matters here.

C. Respondents' assertion of "domestic" injuries (Opp. 12-13) is equally beside the point. The complaint alleges three dozen injuries, the overwhelming majority of which are purely foreign injuries to sovereign states, such as lost taxes, increased law enforcement costs, and harm to foreign economies. Pet.App. 214a-227a. Excising those alleged injuries would dramatically scale back this case.

III. The Second Circuit Was Wrong On The Merits

Respondents' extended merits arguments do not obviate the need for this Court to resolve the

entrenched circuit split. In any event, they are unpersuasive even on their own terms.

After long block-quotes from the decision below, which we have already addressed (Pet. 31-35), respondents invoke the truism that RICO must be construed "as a whole." Opp. 26-29. But that does not mean *importing* the extraterritorial force of *distinct predicate offenses* cross-referenced in it. As respondents correctly explain, this Court considered the Securities Exchange Act in its entirety in determining whether § 10(b) of that Act applies extraterritorially. Opp. 27. However, what it held was that the extraterritorial force of other provisions must be "limit[ed] ... to [their] terms," and did not somehow carry over to § 10(b). *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247, 264-65 (2010).

Respondents also resort to legislative history—in particular, the Patriot Act's insertion into RICO of various extraterritorial predicate offenses. Opp. 32-33. However, those insertions are no different in principle from the insertion of various other extraterritorial offenses into RICO by prior Congresses. And, as the dissents from denial of en banc explained, incorporation of extraterritorial predicates does not show any clear intent for "RICO *itself*" to apply extraterritorially, Pet.App. 70a (Cabranes, J.)—even as to predicates that, unlike the money-laundering and material-support predicates at issue here, apply exclusively abroad, Pet.App. 85a (Raggi, J.). Moreover, given the long criminal sentences available for terrorism-related predicate offenses, it "raises a false alarm to suggest that prosecutors will be thwarted in bringing terrorists to

justice" if RICO itself were limited to domestic conduct. Pet.App. 87a (Raggi, J.).

Respondents object that we seek to impose a "civil-criminal distinction" within RICO. Opp. 29. As to the pattern and enterprise requirements of 18 U.S.C. § 1962, we do no such thing. Rather, we simply contend that those elements must be limited to domestic patterns and enterprises. As to the injury requirement of 18 U.S.C. § 1964(c), Congress itself imposed the distinction, by requiring injury as an element of a private civil claim, but not as an element of criminal liability. Hardly a return to the maligned, open-ended "effects test," as respondents erroneously contend (Opp. 34), the requirement of a domestic injury flows directly from the role of injury as the obvious "focus" of Section 1964(c) *See Morrison*, 561 U.S. at 266.

Finally, respondents object that the requirement of a domestic injury "has no textual support" in RICO and that "this Court has consistently declined to engraft extratextual limitations upon RICO." Opp. 35. As to the latter point, this Court has held that Section 1964(c) implicitly incorporates settled background rules regarding proximate causation. *Holmes v. SIPC*, 503 U.S. 258, 267 (1992). Here, of course, there is a comparably settled background rule that statutory silence operates to confine federal statutes to "domestic, not foreign matters." *Morrison*, 561 U.S. at 255. Respondents' complaint that this is impermissibly "extratextual" amounts to nothing less than a direct attack on the presumption against extraterritoriality itself.

In short, because RICO's text is silent as to its extraterritorial force, it necessarily "has none." *See id.*

MARK R. SEIDEN
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

GREGORY G. KATSAS
Counsel of Record
JOHN M. GORE
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
ggkatsas@jonesday.com

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